Complaint

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

[SAME TITLE]

The plaintiffs above named, by Leslie A. Hynes, their attorney, complaining of the above-named defendants allege:

FIRST: That plaintiffs Richard J. Woodward, Ned P. Clyde, James L. Sherard, Raymond Lundgren, Douglas C. Moorhouse and David M. Greer, doing business as Woodward-Clyde-Sherard & Associates, a partnership. having its principal office for the transaction of business at 277 Park Avenue, New York, New York, at all times hereinafter mentioned was and still is a partnership doing business under the firm name of Woodward-Clyde-Sherard & Associates.

SECOND: That defendant D. H. Overmyer Co., Inc. is an Ohio corporation, licensed to do business in the State of New York, having an office and place of business at 201 East 42nd Street, New York, New York, and shall hereinafter be referred to as "Overmyer Ohio".

THIRD: That defendant D. H. Overmyer Co., Inc. is a New York corporation having an office for the transaction of business at 201 East 42nd Street, New York. New York and shall hereinafter be referred to as "Overmyer New York".

FOURTH: That upon information and belief, Overmyer New York is a wholly owned subsidiary of Overmyer Ohio.

Complaint

FIFTH: That defendant The Seamen's Bank for Savings in the City of New York is a New York corporation having an office for the transaction of business at 30 Wall Street, New York, New York.

SIXTH: That defendant Quickway Excavators, Inc. is a New York corporation having an office for the transaction of business at 23 Abbott Drive, Town of Poestenkill, Rensselaer County, New York.

SEVENTH: That defendant Nuclear Corporation of America is a Delaware corporation licensed to do business in the State of New York.

EIGHTH: That defendant, M. Kramer & Sons, Inc. is a New York corporation having an office for the transaction of business at 91 Colvin Avenue, Albany, New York.

NINTH: That heretofore and on or about the 20th day of February, 1967, defendant Overmyer Ohio, by its President and its Secretary-Treasurer, for the purpose of securing the payment to plaintiffs of the sum of $243,654.35, executed and delivered to plaintiffs thirteen serial promissory notes in the total amount of $243,654.35, with interest thereon at the rate of 6% from February 20, 1967, in accordance with an agreement dated February 21, 1967. A copy of said agreement and notes are attached hereto, made a part hereof and marked Exhibit "A".

TENTH: That in said notes, it was expressly provided that in the event of the non-payment of any one of said series and such default continues for a period of sixty (60) days, then, at the option of the holder of any of said notes, all or any part of the remaining unpaid notes shall forthwith become due and payable.

ELEVENTH: That on the 23rd day of May, 1967, as collateral security for the payment of $183,654.35 (the principal amount of the then unpaid serial notes 5 to 13 inclusive) and interest thereon, defendant Overmyer New York, by its Vice President, duly made, executed and delivered to plaintiffs a mortgage, a copy of which is attached hereto, made a part hereof and marked Exhibit "B", whereby it mortgaged to the said plaintiffs the following described premises with the appurtenances thereto, described in the said mortgage as follows, to wit:

> "BEGINNING at an existing iron pipe marker in the Southwesterly line of Middle Road where said Southwesterly line is intersected by the Northwesterly line of lands now or formerly of Paige. said point of beginning being distant along the Southwesterly line of Middle Road Northwesterly about 648 feet from the Northwesterly line of New Karner Road (N. Y. S. Route 155) and runs thence along the Northwesterly line of lands now or formerly of Paige and through the lands of the New York Central and Hudson River Railroad Company South, 50 deg. 38 Min. West, nine hundred sixty-eight and sixteen hundredths feet (968.16') to a point; thence through the lands of the New York Central and Hudson River Railroad Company North 37 deg. 02 min. West. Three Hundred Thirty-three and seven tenths feet (333.7') to a point: thence through the lands of the New York Central and Hudson River Railroad Company and along the Southeasterly line of lands now or formerly of Henry P. Burroughs North 52 deg. 58 Min. East. nine hundred nine feet (909.0') to a point in the Southwesterly line of Middle Road; thence along said Southwesterly line of Middle Road South 48 deg. 15 min. East. three hundred feet (300.0') to

the point or place of beginning and containing about 6.776 acres of land.

TWELFTH: That said mortgage was duly recorded in the Office of the Clerk of the County of Albany on the 6th day of June, 1967, at 2:03 pm in Book #1894 of Mortgages, page 139, that being the County within which the said premises are located, and on information and belief, the mortgage tax due thereon was duly paid.

THIRTEENTH: That in said mortgage, defendant Overmyer New York covenants as follows:

"And the Mortgagor covenants with the Mortgage as follows:

1. That the Mortgagor will pay the indebtedness as hereinbefore provided."

* * * *

"4. That the whole of said principal sum and interest shall become due at the option of the Mortgagee; after default in the payment of any installment of principal or of interest for 60 days; or after default in the payment of any tax, water rate or assessment for 60 days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the Mortgagee for premiums paid on such insurance, as hereinbefore provided, or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

"5. That the holder of this mortgage, in any action to foreclose the mortgage, shall be entitled to the appointment of a receiver."

• • • •

"10. That this mortgage is subject and subordinate to a certain mortgage in the principal amount of $700,000.00 between D. H. Overmyer Co., Inc., a New York corporation, (formerly known as D. H. Overmyer Company, Inc.), as Mortgagor and Marine Midland National Bank of Troy, a national banking association, organized under the banking laws of the United States of America, having a principal office at Franklin Square, Troy, New York, which mortgage was dated January 3, 1966 and recorded January 3, 1966 in the Office of the County Clerk of Albany County, State of New York in mortgage Liber 1845, page 111. This mortgage was assigned to The Seamen's Bank for Savings in The City of New York, a New York corporation, having its principal office at 30 Wall Street, New York, New York, by an assignment executed October 20, 1966 and recorded October 27, 1966 in the Office of the County Clerk, Albany County, State of New York, in mortgage Liber 1876, page 337. Said mortgage was amended by a certain Agreement Extending Mortgage between D. H. Overmyer Co., Inc. and The Seamen's Bank for Savings in the City of New York, which Agreement was executed October 26, 1966."

FOURTEENTH: That defendant Overmyer Ohio, between February 20, 1967 and August 20, 1967, duly paid serial notes 1 to 7 in the total amount of $120,000.00 with interest thereon.

FIFTEENTH: That serial note numbered 8 in the principal amount of $20,000.00 due on September 20, 1967 was presented for payment by plaintiffs but payment was refused, as per the Notice of Protest attached hereto, made a part hereof and marked Exhibit "C".

SIXTEENTH: That there is now justly due plaintiffs upon said serial notes and mortgage the sum of $123,654.35, with interest thereon from the 20th day of February, 1967, at the rate of 6% per annum.

SEVENTEENTH: That the balance of aforesaid principal sum in the amount of $123,654.35 with interest thereon has become currently due and the mortgage is in default.

EIGHTEENTH: That plaintiffs have not assigned the aforesaid notes and mortgage and are the lawful owners and holders thereof.

NINETEENTH: No other action has been brought to collect the mortgage debt secured by the mortgage herein set forth.

TWENTIETH: That defendants, Quickway Excavators, Inc., Nuclear Corporation of America and M. Kramer & Sons, Inc. have or claim to have some interest or lien upon the said mortgaged premises or some part thereof, which interests or liens have accrued subsequent to the lien of the mortgage sought to be foreclosed in the within action, and/or are subordinate thereto.

TWENTY-FIRST: The State of New York and the State Tax Commission have or claim to have or may have some claim or lien against said mortgaged premises or some part thereof by reason of the fact that the corporation franchise or other taxes may be due to them from defendant Overmyer New York, which liens, if any, accrued

subsequent to the lien of the mortgage sought to be foreclosed herein and are subordinate thereto, and the People of the State of New York and the State Tax Commission are made parties hereto by reason thereof, and for no other reason.

WHEREFORE, plaintiffs demand judgment from the defendants and each of them, and all persons claiming under them, or any of them, subsequent to the commencement of this action and the filing of a notice of pendency thereof, be barred and foreclosed of and from all estate, right, claim, lien, interest, title and equity of redemption of, in and to the said mortgage premises and each and every part and parcel thereof; that the said premises may be decreed to be sold in one parcel according to law; that the moneys arising from the sale may be brought into Court; that the plaintiffs may be paid the amount due on the said notes and mortgage, with interest to the time of such payment and the expenses of such sale, together with the costs, allowances and disbursements of this action, so far as the amount of such moneys properly applicable thereto will pay the same; and that defendants Overmyer New York and Overmyer Ohio may be adjudged to pay any deficiency that may exist after the application of such moneys, the amount of such deficiency to be determined by the Court as provided in the Civil Practice Law and Rules of the State of New York, and that the plaintiffs may have such other and further relief in the premises as may be just and equitable.

LESLIE A. HYNES
Attorney for Plaintiffs
Office & P. O. Address
50 Broadway
New York 4, N. Y.

Exhibit A, Annexed to Complaint

LESLIE A. HYNES

COUNSELLOR AT LAW

50 Broadway

New York, N. Y. 10004

(212) HAnover 2-9424

Leslie A. Hynes
William Doyle Powers
Francis P. Donelan

February 21, 1967

E. M. Connery, Esq.
D. H. Overmyer Co., Inc.
201 East 42nd Street
New York, New York

Re: Woodward Clyde, Sherard & Associates
D. H. Overmyer Co., Inc.

Dear Mr. Connery:

This letter confirms and shall constitute our agreement to settle the existing debt owed to Woodward, Clyde, Sherard & Associates (hereinafter called "Creditor") in the sum of $243,654.35 which D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter called "Debtor"), has agreed to pay.

In payment of this debt Debtor has agreed to issue thirteen serial notes to Creditor. The first note shall be in the sum of $10,000.00 and payable on February 20, 1967. The second note shall also be in the sum of

$10,000.00 and shall be payable on March 20, 1967. The third through twelfth notes shall be in the sum of $20,000.00 each and shall be payable monthly commencing April 20, 1967. The thirteenth note shall be in the sum of $23,654.35 and payable on February 20, 1968. All of the notes shall bear interest at the rate of 6% per annum from February 20, 1967. They shall also contain an acceleration provision which will, at Creditor's option, make all unpaid notes due and payable in the event that payment of any one of the notes is not made within sixty (60) days from its due date. It is understood and agreed by Creditor that Debtor shall have the right to prepay the notes without penalty.

It is further understood and agreed that Debtor, as security for the aforementioned debt, shall furnish the Creditor with a second mortgage to the full extent of the debt on improved real estate owned by the Debtor. The only lien against this real estate shall be a first mortgage. Debtor shall have until March 15, 1967 within which to select the real estate, which must be approved by the Creditor, and to furnish Creditor with the necessary legal documents. Creditor shall have the right to file the appropriate documents evidencing its rights in the real estate.

It is further agreed that Creditor shall continue to perform services in accordance with the terms and conditions of the Agreement entered into between Creditor and Green & White Construction Co. dated August 9, 1966. Debtor shall have sixty (60) days from the date on which invoices are received by Green & White Construction Company, Inc. the Creditor within which to make payment thereof.

Exhibit A, Annexed to Complaint

If the above meets with your understanding of our agreement please execute the enclosed copy of this letter and return it to the undersigned.

Very truly yours,

LESLIE A. HYNES
By William D. Powers

WDP:vj

Accepted

D. H. Overmyer Co., Inc.
By: (Illegible.)
Date: 2/21/67

Exhibit B, Annexed to Complaint

SECOND MORTGAGE

D. H. OVERMYER Co., Inc.,

to

WOODWARD-CLYDE, SHERARD & ASSOCIATES,

Dated: May 23, 1967

State of New York,
County of Albany, ss:

RECORDED on the day of A. D. 19 in Liber of Deeds at Page and examined.

CARTER & CONBOY
74 Chapel Street
Albany, New York

Clerk

Second Mortgage

THIS INDENTURE, made this 23rd day of May, 1967, between D. H. OVERMYER Co., Inc., a corporation organized under the Laws of the State of New York, whose principal place of business is 201 East 42nd Street, New York, New York 10017, hereinafter referred to as "Mortgagor" and WOODWARD-CLYDE, SHERARD & ASSOCIATES, a partnership with an office and place of business at 277 Park Avenue, New York, New York, hereinafter referred to as "Mortgagee".

Exhibit B, Annexed to Complaint

WITNESSETH:

THAT, WHEREAS, D. H. Overmyer Co., Inc., an Ohio corporation is justly indebted to the Mortgagee in the total principal sum of $243,654.35, which principal sum has been reduced to $183,654.35. This indebtedness is evidenced by serial notes executed by said D. H. Overmyer Co., Inc., an Ohio corporation, payable monthly at 6% interest per annum with the final payment to be made on February 20, 1968.

Payments of principal and interest due from time to time shall be paid at the offices of the Chemical Bank New York Trust Company, 277 Park Avenue, New York, New York.

NOW, THEREFORE, the Mortgagor, in order to secure the payment of said reduced indebtedness, together with interest thereon, in accordance with the terms of said notes, does hereby mortgage to the Mortgagee the following described real estate, situate, lying and being in the Town of Colonie, County of Albany, State of New York, described as follows:

> BEGINNING at an existing iron pipe marker in the Southwesterly line of Middle Road where said Southwesterly line is intersected by the Northwesterly line of lands now or formerly of Paige, said point of beginning being distance along the Southwesterly line of Middle Road Northwesterly about 648 feet from the Northwesterly line of New Karner Road (N.Y.S. Route 155) and runs thence along the Northwesterly line of lands now or formerly of Paige and through the lands of the New York Central and Hudson River Railroad Company South, 50 deg. 38 min. West, nine hundred sixty-eight and sixteen hundredths feet (968.16') to a

point: thence through the lands of the New York Central and Hudson River Railroad Company North 37 deg. 02 min. West, three Hundred Thirty-three and seven tenths feet (333.7') to a point; thence through the lands of the New York Central and Hudson River Railroad Company and along the Southeasterly line of lands now or formerly of Henry P. Burroughs North 52 deg. 58 min. East, nine hundred nine feet (909.0') to a point in the Southwesterly line of Middle Road; thence along said Southwesterly line of Middle Road South 48 deg. 15 min. East, three hundred feet (300.0') to the point or place of beginning and containing about 6.776 acres of land.

And the Mortgagor covenants with the Mortgagee as follows:

1. That the Mortgagor will pay the indebtedness as hereinbefore provided.

2. That the Mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the Mortgagee; that he will assign and deliver the policies to the Mortgagee; and that he will reimburse the Mortgagee for any premiums paid for insurance made by the Mortgagee on the Mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.

3. That no building on the premises shall be removed or demolished without the consent of the Mortgagee.

4. That the whole of said principal sum and interest shall become due an the option of the Mortgagee; after default in the payment of any installment of principal or of interest for 60 days; or after default in the pay-

ment of any tax, water rate or assessment for 60 days after notice and demand; or after default after notice and demand either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the Mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the bond and mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.

5. That the holder of this mortgage, in any action to foreclose the mortgage, shall be entitled to the appointment of a receiver.

6. That the Mortgagor will pay all taxes, assessments or water rates, and in default thereof, the Mortgagee may pay the same.

7. That the Mortgagor within 30 days upon request in person or within 30 days upon request by mail will furnish a written statement duly acknowledged of the amount due on this bond and mortgage and whether any offsets or defenses exist against the mortgage debt.

8. That notice and demand or request may be in writing and may be served in person or by mail.

9. That the Mortgagor warrants the title to the premises.

10. That this mortgage is subject and subordinate to a certain mortgage in the principal amount of $700,000.00 between D. H. Overmyer Co., Inc., a New York corporation, (formerly known as D. H. Overmyer Company, Inc.), as Mortgagor and Marine Midland National Bank of Troy, a national banking association, organized under

the banking laws of the United States of America, having a principal office at Franklin Square, Troy, New York, which mortgage was dated January 3, 1966 and recorded January 3, 1966 in the Office of the County Clerk of Albany County, State of New York in mortgage Liber 1845, page 111. This mortgage was assigned to The Seamen's Bank for Savings in The City of New York, a New York corporation, having its principal office at 30 Wall Street, New York, by an assignment executed October 20, 1966 and recorded October 27, 1966 in the office of the County Clerk, Albany County, State of New York, in mortgage Liber 1876, page 337. Said mortgage was amended by a certain Agreement Extending Mortgage between D. H. Overmyer Co., Inc., and The Seamen's Bank For Savings In The City of New York, which Agreement was executed October 26, 1966.

11. That the Mortgagor or its assigns or the holder of the serial notes were secured by this mortgage (or its assigns), shall at any time, before February 20, 1968, have the privilege to pre-pay the entire principal balance of this mortgagee (with interest) on giving five days notice in writing to the Mortgagee, or its assigns of intention to do so.

D. H. Overmyer Co., Inc.
G. R. Silcox
Vice-President

In the presence of:

Attest:

A. Roger Milio
Assistant-Secretary

Exhibit B, Annexed to Complaint

State of New York
County of New York

On the 23rd day of May, in the year 1967, before me personally came G. R. Silcox, to me known, who being by me duly sworn, did depose and say that he resides in Seven Echo Drive, Darien, Connecticut; that he is the Vice President of D. H. Overmyer Co., Inc., the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

PHYLLIS PRESSLER
Notary Public, State of New York
No. 30-3157385
Qualified in Nassau County
Commission Expires March 30 1969
Certified in N. Y. County

Affidavit of James H. Reidy in Support of Proposed Order on Motion for Rehearing of Motion to Intervene

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

[SAME TITLE]

State of New York,
County of New York, ss:

JAMES H. REIDY, being duly sworn, deposes and says that he is an attorney at law, duly admitted to practice law in the State of New York and that he is of counsel to E. M. Connery, Esq., the General Counsel of defendants, D. H. Overmyer Co., Inc., of New York and Ohio (hereinafter collectively referred to as Overmyer.) The New York corporation is a wholly owned subsidiary of the Ohio corporation.

This affidavit is submitted in support of Overmyer's proposed order, submitted herewith, on this court's decision rendered from the bench on January 5, 1970, on the motions by Overmyer and proposed intervenor Green & White Construction Co., Inc., for renewal of the motion for an order to permit Green & White to intervene as a plaintiff and to stay the summary judgment awarded to plaintiffs.

The proposed order submitted herewith contains, among other things, a decretal paragraph permitting Overmyer to serve and file an answer to the complaint containing counterclaims against the plaintiffs. Such a proposed order is submitted in the interests of justice in view of the somewhat unique history of this litigation which is summarized below.

On or about September 18, 1967, Green & White Construction Co., Inc., commenced an action against Douglas C. Moorhouse and David M. Greer, two of the part-

ners of the plaintiff partnership in the suit at bar. That Green & White action was brought in the United States District Court, District of Massachusetts. The complaint alleged that the defendants were guilty of professional malpractice, which is more clearly described below.

Moorhouse and Greer moved to dismiss the complaint for improper service of process and the motion was granted with leave to amend the complaint. In the interim, Woodward-Clyde-Sherard (hereinafter called W-C-S) commenced its own action in the Supreme Court, County of Albany, State of New York, on December 13, 1967 seeking foreclosure of a mortgage on an Overmyer warehouse. That action was removed to this court on December 30, 1967 upon petition of Overmyer based upon diversity of citizenship (recently Overmyer learned for the first time that the plaintiff partnership was formed under the laws of the State of New York. This raises some doubt about federal jurisdiction).

On December 30, 1967, Overmyer made a motion to dismiss the complaint and thereafter also moved for change of venue. By the service of such motions, the time for Overmyer to answer the complaint was extended by Rule 12, F.R.C.P., to "10 days after notice of the court's action" on the motions.

Before the motions for change of venue and for dismissal of the complaint were decided, the plaintiff, on June 10, 1968, moved for summary judgment, styling it as a "cross-motion". Thereafter, Overmyer moved for an order permitting Green & White to intervene and assert against the plaintiff the professional malpractice causes of action.

This court decided all pending motions on November 20, 1969, in one decision. That decision constituted an order respecting the denial of the motions for dismissal of the complaint, intervention and change of venue. The

parties were instructed to settle an order respecting the decision granting plaintiff's motion for summary judgment. The order and judgment of foreclosure and sale (based upon plaintiffs motion for summary judgment) was signed and filed on January 23, 1970. In the interim, between November 20, 1969 decision and the January 23, 1970 order, Overmyer moved for renewal of the motion for intervention and for a stay of summary judgment. Those motions were denied from the bench on January 5, 1970 with instructions to counsel to "settle order". This affidavit and the annexed proposed order are in compliance with that direction.

The affidavits submitted by the defendants on the various motions are replete with references to allegations of negligence, breach of contract and, as perhaps more aptly described, professional malpractice of plaintiffs. The factual basis of these allegations is that the proposed intervenor, Green & White, retained the plaintiffs as professional engineers to make borings and subsurface studies and other related tasks relative to an area in Framingham, Massachusetts, known as sites Nos. 6 & 7. The plaintiffs in this action, either alone or in concent with a subcontractor retained by plaintiffs, allegedly negligently, carelessly and unprofessionally performed their work which resulted in damages of $300,000.

It is anticipated herein that the plaintiffs will raise an objection to which they have alluded in the past concerning the ownership of this professional malpractice claim. Before discussing the legalities of this issue, it is respectfully submitted that the practical business aspects should be first considered.

In about February of 1968, Overmyer (Ohio) assumed liabilities of Green & White and thereby became entitled to receivables and other claims in favor of Green & White.

Affidavit of James H. Reidy in Support of Proposed Order

At the commencement of the within litigation, it was decided to leave the claim against W-C-S in the name of Green & White because the motions made by Overmyer relieved it of the necessity of serving an answer to the complaint which would then have had to include all known counterclaims. In addition, this procedure was consistent with the fact that Green & White had previously commenced litigation in Massachusetts against W-C-S on this claim. Therefore, before the motions of Overmyer were decided, Overmyer moved also for an order permitting Green & White to intervene and assert the professional malpractice claim against plaintiff. The resistance of the partners of W-C-S in Massachusetts made this the most practical solution to that potentially difficult jurisdiction issue. When the Massachusetts action finally was discontinued, there was no longer any great need for the claim to remain in the hands of Green & White, unless the motion for intervention was granted.

Unfortunately, all of the motions were decided at one time. In effect, on November 20, 1969, Overmyer was informed that the professional malpractice claim could not be asserted by Green & White (by way of intervention), and that it was now also too late for Overmyer to assert the claim, as had been its right.

In the affidavit of Edmund M. Connery, Esq., submitted in support of the renewal motion, he indicated the desire of Overmyer to assert the professional malpractice claim in its own name, if intervention was to be ultimately denied. Mr. Connery stated:

"Overmyer, Ohio, which owns all the stock in affiliates of the same name in other States, in February, 1968, assumed all liabilities of Green & White and in consideration therefore became entitled to all the claims

and accounts receivable of said Green & White, liquidated and unliquidated."

"In order to make said transfer effective, Green & White and Overmyer of Ohio adopted resolutions by their respective Boards of Directors transferring this specific claim against W-C-S to Overmyer, Ohio, which owns all of the stock in Overmyer, New York."

"It is the purpose of this assignment to express the true ownership of this claim, and make possible its satisfaction by decision of this Court which has jurisdiction of the W-C-S partnership."

The engagement of Green & White by plaintiffs was in April of 1965. There is some question as to what jurisdiction's statute of limitations controls. It is possible that if Overmyer is not permitted to assert the professional malpractice claim against plaintiff in this action that it may be barred from doing so in a plenary action in this or some other jurisdiction. On the other hand, if a counterclaim is now permitted, the date the action was "commenced" under the laws of the state whose statute of limitations may control would be the date upon which a claim was first referred to in this litigation (or perhaps even when the action was commenced.) This would appear to be so because in a summary judgment motion made prior to joinder of issue the opposing affidavits are in lieu of the pleadings.

It may thus be crucial to Overmyer that it be allowed to assert the counterclaims in this action to avoid the bar of the statute of limitations. In addition, it would appear to be the fairest way to resolve all of the issues between the parties. I have been informed that the Overmyer corporations have other subsequent recently discovered professional malpractice claims at other sites, which will also be asserted against the plaintiffs in this

action. It would certainly seem to be the fairest procedure to all parties to have such additional claims asserted herein rather than in some other jurisdiction(s). Furthermore, and perhaps as the paramount reason, *but for* the coincidence that the motion for summary judgment was granted to the plaintiff before defendants had an opportunity to answer and assert counterclaims, a stay of the order and judgment of foreclosure could have been granted by this court under Rules 54 (b) and 62 (h) F.R.C.P., pending determination of the counterclaims. Indeed, it is the intention of Overmyer to ask for such a stay if this court permits counterclaims to be asserted at this time and if no stay is then in effect.

It is respectfully prayed that the court sign the annexed proposed order to permit the defendants an opportunity to raise counterclaims which it would be able to do but for the coincidence in timing of the decisions on the motions referred to above.

JAMES H. REIDY

(Sworn to January 30, 1970)

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3172

Plaintiff Demands Trial by Jury

D. H. OVERMYER CO., INC., an Ohio Corporation, individually and as assignee of D. H. Overmyer Co., Inc., a Utah corporation, D. H. Overmyer Co., Inc., a Massachusetts corporation, and Green and White Construction Co., Inc., a Delaware corporation,

Plaintiff,

against

RICHARD J. WOODWARD, NED P. CLYDE, JAMES L. SHERARD, RAYMOND LUNDGREN, DOUGLAS C. MOOREHOUSE, and DAVID M. GREER, doing business as WOODWARD-CLYDE-SHERARD & ASSOCIATES, a partnership,

Defendants.

Plaintiff, by its attorneys, Gerard L. Goettel and James H. Reidy, complaining of defendants, alleges, upon information and belief, as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. At all pertinent times, plaintiff was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Ohio and licensed to do business in the State of New York.

2. At all pertinent times, Green and White Construction Company, Inc. ("Green & White") was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Delaware.

3. At all pertinent times, D. H. Overmyer Co., Inc., a Utah corporation, ("Overmyer Utah") was and still is a corporation duly organized and existing under and pursuant to the laws of the State of Utah.

4. At all pertinent times, D. H. Overmyer Co., Inc., a Massachusetts corporation ("Overmyer Massachusetts") was and still is a corporation duly organized and existing under and pursuant to the laws of the Commonwealth of Massachusetts.

5. On or about June 16, 1970, Overmyer Massachusetts and Overmyer Utah, for a valuable consideration, assigned to plaintiff all of their right, title and interest in and to all claims they held against the defendants.

6. On or about February 15, 1968, Green & White for a valuable consideration, assigned to plaintiff all of its right, title and interest in and to all claims they held against the defendants.

7. At all pertinent times, the defendants did business as a partnership under the firm name of Woodward-Clyde-Sherard & Associates and held themselves out as qualified engineers with the requisite skills, qualifications, and knowledge to perform sub-surface and soil tests, to determine the geological suitability of tested land areas for construction of buildings and other improvements, and to perform and review other tests and studies in relation thereto.

8. In or about April 1966, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area on New York Avenue, Framingham, Massachusetts designated by Green & White as Sites Nos. 6 and 7, comprising approximately 14½ acres of land.

9. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly performing said tests; in failing to notify plaintiff's assignors of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the sites; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligntly, carelessly and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

10. By reason of the foregoing, plaintiff has been damaged to the extent of $300,000.00 (Three Hundred Thousand Dollars).

AS AND FOR A SECOND CAUSE OF ACTION

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered 1 through 7 of this complaint with the same force and effect as if set forth here at length.

12. In or about October, 1965, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area in Everett, Mass., designated by Green & White as Site No. 2.

13. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly preforming said tests; in failing to notify plaintiff's assgnors of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the site; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligently, carelessly and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

14. By reason of the foregoing, plaintiff has been damaged to the extent of $100,000.00 (One Hundred Thousand Dollars).

AS AND FOR A THIRD CAUSE OF ACTION

15. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered 1 through 7 of this complaint with the same force and effect as if set forth here at length.

16. In or about February, 1966, the defendants entered into an agreement with Green & White, wherein and whereby, for a monetary consideration, defendants agreed to test for geological suitability for the construction of warehouse facilities and to perform other services in regard thereto an area in North Salt Lake, Utah.

17. The defendants breached said agreement by: failing to perform the necessary tests to determine the suitability of the aforesaid area for construction of the contemplated warehouse facilities; failing to use their knowledge, skills and experience in properly performing said tests; in failing to notify plaintiff's assignor of the unsuitability of the area for construction of warehouse premises; in failing to properly inspect the site; in failing to supervise the testing procedures; all of which it had promised and agreed to perform; and in otherwise breaching the letter and spirit of said agreement; and the defendants negligently, carelessly, and unskillfully performed their duties without exercising the normal skills of their profession; all to the damage and detriment of plaintiff, without any negligence of plaintiff or its assignors contributing thereto.

18. By reason of the foregoing, plaintiff has been damaged to the extent of $250,000.00 (Two Hundred and Fifty Thousand Dollars).

WHEREFORE, plaintiff demands judgment against the defendants:

1) On the First Cause of Action in the sum of Three Hundred Thousand Dollars ($300,000.00).

2) On the Second Cause of Action in the sum of One Hundred Thousand Dollars ($100,000.00).

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3) On the Third Cause of Action in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

4) With interest, costs and disbursements in this action.

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